No. 09-160

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

*Petitioners*,

—v.—

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the government may rely on Exemption 7(F) of the Freedom of Information Act, an exemption intended to protect individuals who would be endangered by the disclosure of identifying information contained in law enforcement records, to withhold photographs depicting the abuse of prisoners by U.S. personnel in Afghanistan and Iraq based on a general assertion that release of the photographs could provoke a violent response.

## CORPORATE DISCLOSURE STATEMENT

Respondents have no parent corporations, and no publicly held company owns 10% or more of respondents' stock.

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## STATEMENT OF THE CASE

This case concerns the public's right to know about the treatment of prisoners held by the U.S. government overseas. It arises from Freedom of Information Act ("FOIA") requests filed by respondents after news organizations reported that prisoners held by the Defense Department and Central Intelligence Agency had been abused, tortured, and in some cases killed in custody. Respondents' FOIA requests, filed in October 2003 and May 2004, sought records concerning the "treatment of Detainees" held by the United States overseas, the "deaths of [such] Detainees" in custody, and the "rendition of Detainees and other individuals" to countries known to employ torture. Respondents commenced the instant litigation in June 2004. At the time, nine months had passed since respondents' first request, but the only record that the government had released was a five-page set of talking points authored by the State Department.

In August 2004, the district court ordered the government to process respondents' requests and directed respondents to supply the government with a priority list in order to aid the government in doing so. *Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501, 502-05 (S.D.N.Y. 2004). On their priority list, respondents identified, among other records, a set of photographs and videos that Army Specialist Joseph Darby had provided to Army investigators (the "Darby photographs"). A subset of those photographs had been published by the media in April 2004; they depicted prisoners at the Abu

Ghraib prison in Iraq who had been stripped naked, sexually humiliated, held in "stress positions," and threatened with dogs.

The government refused to release the Darby photographs, citing FOIA Exemptions 6 and 7(C), which authorize withholding where disclosure would constitute an "unwarranted invasion of personal privacy." *See* Pet. App. 112a-113a. It argued that the disclosure of the photographs would infringe the privacy interests of the prisoners depicted even if the photographs were redacted to obscure identifying features. *Id.*[1] More than two months after oral argument, however, the government offered a new justification for withholding the photographs: that the photographs were exempt under 5 U.S.C. § 552(b)(7)(F) because they were "compiled for law enforcement purposes" and disclosure "could reasonably be expected to endanger the life or physical safety of any individual." Pet. App. 124a. The government contended, in particular, that release of the photographs could reasonably be expected to endanger the life or safety of U.S. troops, other Coalition forces, and civilians in Iraq and Afghanistan. *Id.* at 125a. The government stated that these concerns related to "national security," but

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[1] The government also argued that disclosure would violate the prisoners' Geneva Convention rights, Pet. App. 122a-123a, though the government had contended in other contexts that at least some of the prisoners were not entitled to the protection of those Conventions, *see, e.g.*, Memorandum from President George Bush, *Humane Treatment of Taliban and al Qaeda Detainees* (Feb. 7, 2002). Both the district court and Second Circuit rejected the argument, Pet. App. 52a-59a, 122a-124a, and the government does not pursue it here.

it did not invoke FOIA's national security exemption. *Id.* at 20a.

In a September 2005 order, the district court rejected the government's privacy arguments, finding that the prisoners' privacy interests could be protected by the redaction of identifying features and that any residual privacy interest would be outweighed by the public interest in disclosure. *Id.* at 116a-122a. The district court also rejected the government's "supplemental" argument relating to Exemption 7(F). *Id.* at 124a-133a. The court acknowledged the "risk that the enemy will seize upon the publicity of the photographs and seek to use such publicity as a pretext for enlistments and violent acts." *Id.* at 132a. It rejected the contention, however, that the language of Exemption 7(F)—and in particular the phrase "any individual"—could be stretched to authorize the withholding of evidence of governmental misconduct based solely on general assertions of harm that might attend its potential use as propaganda. *Id.* at 130a-131a. The court also noted that the public interest in the photographs was significant, that disclosure would foster "education and debate," and that the "core values of FOIA [were] very much implicated." *Id.* at 131a-132a.

The government appealed the district court's order but withdrew its appeal after a third party published the Darby photographs on the Internet. The government subsequently acknowledged, however, that it possessed 29 other photographs responsive to respondents' FOIA requests. Whereas the Darby photographs involved abuse at the Abu Ghraib prison, according to the government the 29

additional photographs were taken in at least seven different locations in Afghanistan and Iraq. Relying on the reasoning of its September 2005 order, the district court ordered the government to disclose 21 of the photographs, all but one in redacted form. *Id.* at 61a-62a. The court found that 8 of the photographs were not responsive to respondents' FOIA requests. *Id.* at 64a.[2]

A unanimous panel of the Second Circuit affirmed. The court found that the plain language of Exemption 7(F) requires the government to do more than "point to a group composed of millions of people and establish that it could reasonably be expected that someone in that group will be endangered." *Id.* at 11a. While the provision does not require the government to *name* a specific individual, or even to identify a single individual rather than a small group of individuals, the provision's reference to "any individual," the court held, requires "that the subject of the danger be identified with at least reasonable specificity." *Id.* Conversely, to construe the provision in the sweeping manner proposed by the government, the court concluded, would read the phrase "any individual" out of the statute altogether. *Id.* at 16a. Whether the government had satisfied the proper standard here, the court then found, was "not a close question." *Id.* at 18a.

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[2] The government informed respondents on June 29, 2006, that it possessed an additional 23 images responsive to respondents' requests, Pet. App. 6a n.2, and on May 28, 2009, it acknowledged the existence of an unspecified but "substantial number" of additional responsive images, *id.* at 185a. All of the images at issue here relate to closed investigations. Pet. 6.

The court supported its conclusion as to the scope of Exemption 7(F) by noting that FOIA includes a separate exemption for withholdings justified by national security concerns and that this exemption, together with the Executive Order referenced in the exemption, "set[] forth limits on what may be classified, by what authority, and for how long." *Id.* at 20a.[3] To adopt the government's unprecedented construction of Exemption 7(F), the court reasoned, would "convert exemption 7(F) into, in effect, an alternative classification mechanism entirely lacking the executive's safeguards and standards." *Id.* at 22a-23a.

The court also found that its construction of Exemption 7(F) was consistent with that provision's legislative history and with the weight of the case law interpreting the exemption. *Id.* at 24a-43a. Finally, the court observed that the government's alternative construction would have implications far beyond the circumstances presented by this case. As the court explained, the government's argument could be advanced "with respect to many other documents in a wide range of cases, particularly controversial documents that the government might have the greatest motivation to withhold." *Id.* at 42a. The government's construction, the court concluded, "would radically transform exemption

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[3] Specifically, Exemption 1 provides for the withholding of "matters that are . . . (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

7(F) from a flexible but tailored protection for a fluid but limited class of persons into an alternative secrecy mechanism far broader than the government's classification system." *Id.* at 43a.[4]

The Second Circuit denied the government's petition for rehearing en banc on March 11, 2009. *Id.* at 134a-135a. On April 23, the government informed the district court in writing that it would "not seek certiorari of the Second Circuit's decision," Letter from Lev L. Dassin, Acting U.S. Attorney, to Hon. Alvin K. Hellerstein (Apr. 23, 2009), *available at* http://www.aclu.org/pdfs/safefree/letter_singh_20090423.pdf, and the court of appeals issued its mandate on April 27.[5] On May 13, however, the government announced that it had changed its position and would petition this Court for review of the Second Circuit's decision. The government moved the appeals court to recall its mandate on May 13, and that motion was granted on June 10. The government filed its petition for a writ of certiorari on August 7, 2009.

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[4] The court also rejected the government's reliance on Exemptions 6 and 7(C), Pet. App. 43a-59a, and the government does not ask this Court to review those rulings, Pet. 9 n.7.

[5] At a press conference on April 24, 2009, the White House Press Secretary explained that "the Department of Justice [had] decided based on the [Second Circuit's] ruling that it was hopeless to appeal." The White House, Office of the Press Secretary, Press Briefing, Robert Gibbs (Apr. 24, 2009), *available at* http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-4-24-09.

## REASONS FOR DENYING THE PETITION

The appeals court correctly determined that the FOIA exemption invoked by the government in this case—Exemption 7(F)—does not authorize the government to withhold prisoner abuse photographs based on a general assertion that release of the photographs could provoke a violent response. There was no dissent from the court of appeals' well-reasoned decision, and the government does not claim any conflict in the circuits on the scope of Exemption 7(F). Moreover, the appeals court's decision has no effect on the government's ability to argue that particular records—including photographs—can be withheld on the basis of FOIA's national security exemption, because the government has not invoked that exemption in this case and the courts below did not consider its scope. To grant the government's petition would only serve to further delay the disclosure of information that is of extraordinary interest to the public and of crucial importance to the ongoing national discussion about the abuse of prisoners in U.S. custody overseas.

The government's contention that the court of appeals misconstrued Exemption 7(F) is without merit. As the court noted, the provision's plain language, its statutory context, its legislative history, and the weight of the relevant case law all support the same conclusion: While Exemption 7(F) does not require the government to *name* a specific individual who could reasonably be expected to be endangered by disclosure, the exemption requires the government to identify the subjects of the danger with reasonable specificity. Indeed, virtually all of

the cases that have upheld the government's reliance on Exemption 7(F) have involved law enforcement records that themselves identified, at least inferentially, the individuals whom the government asserted would be harmed by disclosure. Although Congress expanded Exemption 7(F) in 1986 to protect non-law-enforcement personnel potentially endangered by the release of law enforcement records, Congress did not, in doing so, make the exemption limitless, and no court has endorsed the sweeping construction that the government proposes. As the court of appeals properly recognized, Congress did not intend the exemption to become an "ersatz classification system," Pet. App. 42a; nor did it intend the exemption to be used as an "all-purpose damper on global controversy," *id.* at 36a.

This Court has noted that FOIA was enacted "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (describing FOIA as "a structural necessity in a real democracy"). The government's argument here, however, would turn FOIA on its head by affording the greatest protection from disclosure to records that depict the worst governmental misconduct. The court of appeals was right to reject this argument, and this Court should deny the government's petition.

## I. THE SECOND CIRCUIT PROPERLY REJECTED THE GOVERNMENT'S RELIANCE ON EXEMPTION 7(F) TO WITHHOLD PRISONER ABUSE IMAGES BASED ON A GENERAL ASSERTION THAT RELEASE COULD PROVOKE A VIOLENT RESPONSE.

### A. The Plain Language and Statutory Context of Exemption 7(F) Compel the Second Circuit's Conclusion

Exemption 7(F) permits the withholding of "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). The court of appeals correctly found that this language requires the government to do more than establish that "out of a population the size of two nations and two international expeditionary forces combined, someone somewhere will be endangered as a result of the release of the Army photos." Pet. App. 18a. As the court explained, had Congress used the phrase "endanger life or physical safety" (without more), it would have signaled a concern with "danger in general"; Congress's inclusion of the words "of any individual," however, "indicates a requirement that the subject of the danger be identified with at least reasonable specificity." *Id.* at 11a; *see also id.* at 17a.[6] Thus, the

[6] The statute's specificity requirement is not satisfied by the government's still-general claim—raised for the first time in its motion to the Second Circuit seeking a recall of the mandate—

government's contention that the court of appeals grafted an "extra-textual" requirement onto the language of the statute is simply wrong. The court's construction was rooted in the statute's plain language, while the government's proposed construction would render the phrase "any individual" entirely superfluous. The decision below properly construed Exemption 7(F) to "avoid surplusage." *Id.* at 16a.[7]

Also counseling against the government's sweeping construction of Exemption 7(F) is the statutory context in which the exemption appears. The title of the "Freedom of Information Act" reflects an overarching purpose, which was to expand public access to information in the hands of the government. *Id.* at 15a ("'The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature.'" (quoting *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.))). The Act instructs that agency records are to be made available "'except as *specifically* stated' in one of the enumerated

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that the danger to certain American personnel stationed abroad is heightened because their assignments generally place them in greater danger. *See* Pet. 31 n.11. Moreover, the government does not assert that any such danger would stem from the disclosure of identifying information.

[7] Recognizing that the text of Exemption 7(F) did not read "'any *named* individual,'" the court understood the term "individual" "to include individuals identified in some way other than by name—such as, for example, being identified as family members or coworkers of a named individual, or some similarly small and specific group." Pet. App. 11a (emphasis in original).

exemptions." Pet. App. 15a (emphasis in original) (quoting 5 U.S.C. § 552(d)). Those exemptions, this Court has instructed, are to be "'narrowly construed.'" Pet. App. 15a (quoting *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 630 (1982)); *accord U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). As the court of appeals rightly observed:

> The defendants' construction of "any individual" as not requiring the government to name or even roughly identify any individual, besides gesturing to the populations of two nations and two international expeditionary forces and showing that it could reasonably be expected that at least one person within them will be endangered, is not a narrow one. The reading of "any individual" as requiring a FOIA defendant to identify an individual with reasonable specificity is a narrower construction, and to be preferred on that ground alone.

Pet. App. 15a.

The court of appeals also properly recognized that the government's nearly limitless construction of Exemption 7(F) is further undercut by the existence of FOIA's national security exemption. *Id.* at 20a. As noted above, Exemption 1 exempts from disclosure records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact

properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Executive Order 13,292, in turn, "prescribes a uniform system for classifying . . . national security information." Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003). It also "sets forth limits on what may be classified, by what authority, and for how long." Pet. App. 20a. Among these limits is the prohibition against classifying information in order to "conceal violations of law, inefficiency, or administrative error," or to "prevent embarrassment to a person, organization, or agency." *Id.* at 20a-21a (quoting Exec. Order No. 13,292, § 1.7(a)) (internal quotation marks omitted). As the court of appeals observed, the government's construction of Exemption 7(F) would allow an agency to "evade the strictures and safeguards of classification" simply by asserting that records compiled for law enforcement purposes could, if disclosed, "reasonably be expected to endanger someone unidentified somewhere in the world." Pet. App. 22a. This would in effect create "an alternative classification mechanism entirely lacking the executive's safeguards and standards," *id.* at 22a-23a, an outcome that would be "inconsistent with the structure of FOIA's exemptions," *id.* at 23a.

Moreover, "[t]he limitation of exemption 7(F) to law enforcement records does not diminish that inconsistency," *id.*, for two reasons:

> First, the ease with which the government can find refuge for its records on the ground that they were compiled for "law enforcement purposes" can hardly be overstated. *See*

> [*John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 162-64 (1989)] (Scalia, J., dissenting) (describing the ability to transfer records to an investigation file as "a hole one can drive a truck through"). Second, assuming the utmost good faith of the government, the disparate treatment that would be accorded law enforcement national security information and non-law-enforcement national security information confirms that exemption 7(F) will not bear the weight the defendants place upon it. Information generated from national security operations unconnected to law enforcement would be inexplicably subject to higher judicial scrutiny, through exemption 1, than information generated from national security operations performed by means of law enforcement.

*Id.*

The government takes issue with the Second Circuit's discussion of FOIA's national security exemption, contending that because Exemptions 1 and 7(F) involve "different inquir[ies]," Exemption 1 cannot provide a basis for reading Exemption 7(F) restrictively. Pet. 25. The government misses the point. Its construction of Exemption 7(F) is untenable precisely because it would establish a different, much lower standard for withholding information on national security grounds, and would

thereby allow the government to circumvent the safeguards and limitations set out in Exemption 1 and the Executive Order referenced therein. Pet. App. 22a-23a. The problem with the government's construction is not simply that Exemptions 1 and 7(F) "may both be available" with respect to the same records, Pet. 25, but that the government's construction would render Exemption 1 superfluous, Pet. App. 22a-23a.

The government insists that the "textual breadth," of the term "any individual" is necessarily "all-encompassing." Pet. 17, 23. But like every other word, the word "any" takes its meaning from its context. As this Court has recognized in another FOIA case:

> [t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. . . . For our duty . . . is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.

*Abramson*, 456 U.S. at 625 n.7 (quoting *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting), and *NLRB v. Lion Oil Co.*, 352 U.S. 282, 298 (1957) (Frankfurter, J., concurring in part and dissenting in part)) (internal quotation marks omitted); *see also Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("The definition of words in isolation . . . is not necessarily

controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). This Court's jurisprudence construing the word "any" confirms that "'any' can and does mean different things depending upon the setting." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004).[8]

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[8] Cases cited by the government in support of an expansive interpretation of the word "any," *see* Pet. 17, only confirm the relevance of statutory context in construing that word. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 128 S. Ct. 831, 837-38 (2008) (considering context in construing the phrase "any other law enforcement officer"); *United States v. Gonzales*, 520 U.S. 1, 9-11 (1997) (considering context and a later statutory amendment in construing the phrase "any other term of imprisonment"). Notably, although the government relies on *Ali*'s broad construction of the phrase "any other law enforcement officer," this Court interpreted a virtually identical phrase in *United States v. Alvarez-Sanchez* much more narrowly in light of the statutory context there. 511 U.S. 350, 357 (1994) (holding that it was error to "plac[e] dispositive weight on the broad statutory reference to 'any' law enforcement officer or agency without considering the rest of the statute," and construing "any" law enforcement officer to be limited to federal officers); *see also Ali*, 552 U.S. at 836 n.4 (citing *Alvarez-Sanchez*).

This Court has interpreted the word "any" in a limited manner where the context has so demanded. *See, e.g., Small v. United States*, 544 U.S. 385, 394 (2005) (concluding that "the phrase 'convicted in any court' refers only to domestic courts, not to foreign courts"); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586-91 (2004) (rejecting the appellate court's

The government assured the court below that its proposed construction would be "[l]imited to the [f]acts [p]resented by [t]his [c]ase." Pet. App. 42a. There is no doubt, however, that the government's proposed construction of Exemption 7(F) would permit the suppression of a wide array of information, including information relating to governmental misconduct. *Id.* ("While it is true . . . that expert affidavits deem these particular [photographs] to pose such a danger, we have no

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construction of the Age Discrimination in Employment Act—that its prohibition of age discrimination against "any individual" protects younger, as well as older, individuals, *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 469 (6th Cir. 2002)—in favor of a limited construction more consonant with the "whole provision" and its legislative history); *Nixon*, 541 U.S. at 132 (rejecting argument that a statute's reference to "any entity" encompasses both private and public entities); *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 542 (2002) (construing the phrase "any claim asserted" not to include state-law claims against non-consenting states that are dismissed on Eleventh Amendment grounds); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-19 (2001) (narrowly construing the phrase "any other class of workers engaged in foreign or interstate commerce" in light of its context); *Gutierrez v. Ada*, 528 U.S. 250, 254-58 (2000) (construing the phrase "votes cast in any election" in light of congressional intent to apply only to votes cast for gubernatorial slates); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15-16 (1981) ("It is doubtful that the phrase 'any statute' includes the very statute in which this statement was contained."); *Flora v. United States*, 362 U.S. 145, 149 (1960) ("A catchall the phrase ['any sum'] surely is; but to say this is not to define what it catches."); *Palmer*, 16 U.S. (3 Wheat.) at 631 (Marshall, C.J.) (adopting a limited interpretation of "any person or persons" because "general words" must be limited "to those objects to which the legislature intended to apply them").

doubt that similar affidavits could be produced with respect to many other documents in a wide range of cases, particularly controversial documents that the government might have the greatest motivation to withhold."). Indeed, the government's construction of Exemption 7(F) would grant the greatest protection against disclosure to records that depict the most egregious abuses, because it is these records that are most likely to be inflammatory, and it is these records that insurgents and terrorist groups are most likely to "seize upon . . . as grist for their propaganda mill." *Id.* at 181a. Accepting the government's argument would turn FOIA on its head.

The government's further argument that the court of appeals' construction of Exemption 7(F) assumes that Congress placed a "low value on human life," Pet. 17, misunderstands both the structure of FOIA and the principles underlying the Act. Through its nine exemptions, FOIA balances the public interest in disclosure on the one hand with significant governmental concerns on the other. As the court made clear, Exemption 7(F) remains available where the government can identify, with "reasonable specificity," those who would be harmed by disclosure. The court continued: "To say that Exemption 7(F) does not contemplate withholding records on the basis of diffuse threats of death or physical injury, threats which are individually speculative but which can reasonably be expected with respect to large populations, is not to denigrate such threats, which of course are characteristic of the national security sphere." Pet. App. 19a-20a. In those circumstances, "FOIA . . . provides a separate

exemption specifically tailored to the national security context." *Id.* at 20a. The government has not invoked the national security exemption in this case, however, *id.* at 22a n.7, and accordingly, the courts below did not consider it.

### B. The Legislative History of Exemption 7(F) and Case Law Construing that Provision Support the Second Circuit's Conclusion

The legislative history of Exemption 7(F) underscores that the exemption was intended to apply where the government can identify, with "reasonable specificity," individuals who would be harmed by the disclosure of identifying information contained in law enforcement records. Although the 1986 amendments to Exemption 7(F) were meant to expand the scope of that exemption, Congress did not intend to make the exemption limitless or to render Exemption 1, the national security exemption, superfluous. Rather, as the Second Circuit explained: "Congress has always envisioned exemption 7(F) as a shield against specific threats to particular individuals arising out of law enforcement investigations, never as a means of suppressing worldwide political violence." Pet. App. 24a.

As the court of appeals observed, the legislative history shows that in amending Exemption 7(F) Congress sought to address a specific concern: preventing criminals from exploiting FOIA as a means of intimidation or retaliation against persons associated with law enforcement investigations. Prior to the 1986 amendments,

Exemption 7(F) applied only to certain records that, if disclosed, could endanger "law enforcement personnel." The relatively limited scope of this exemption compromised the "ability of law enforcement officers to enlist informants and carry out confidential investigations," because lawbreakers could use FOIA to obtain information about informants and retaliate against them. *Id.* at 33a (quoting 132 Cong. Rec. S14,038 (daily ed. Sept. 27, 1986) (statement of Sen. Hatch)) (internal quotation marks omitted). In amending Exemption 7(F), Congress extended the protections of FOIA to others who might be harmed by the disclosure of identifying information in law enforcement files. Pet. App. 36a.

Thus, Deputy Attorney General Carol Dinkins testified that the 1986 amendments would "expand[] Exemption 7(F) to include such persons as witnesses, potential witnesses, and family members whose personal safety is of central importance to the law enforcement process." *Id.* at 32a (quoting 131 Cong. Rec. S253 (daily ed. Jan. 3, 1985) (statement of Carol E. Dinkins, Deputy Attorney General)) (internal quotation marks omitted); *see also* 132 Cong. Rec. S14,040 (daily ed. Sept. 27, 1986) (quoting letter from William H. Webster, Dir., FBI, to Sen. Dole) ("This provision would amend the Freedom of Information Act to offer needed protections for confidential undercover informants and investigations."). Many legislators made statements to the same effect. *See, e.g.*, 132 Cong. Rec. H9,465 (daily ed. Oct. 8, 1986) (statement of Rep. Kindness) ("Much of the impetus for adjustment of the [FOIA] provisions . . . comes from the concerns . . . that the

act is exploited by organized crime figures attempting to learn . . . the identities of informants. . . . The amendments to [FOIA] are designed to deal with these particularized law enforcement problems."). *See generally* Pet. App. 31a-36a.

The court of appeals correctly concluded that "defendants' argument for an expansive interpretation of the phrase 'any individual' misapprehends the special problem the 1986 amendment was enacted to correct." Pet. App. 36a. The legislative history cited by the government shows that Congress did not intend to limit the *types* of individuals whose safety could provide a basis for withholding records under Exemption 7(F). *See, e.g.*, Pet. 26 (quoting testimony of then-Professor Scalia: "Why only law enforcement personnel? Why not their spouses and children? Come to think of it, why not *anyone*, even you and me?"); *id.* (quoting Attorney General Civiletti's statement that there is "no reason" for protecting "law enforcement personnel to the exclusion of all others"). That history does *not* establish, however, that Congress intended to permit the government to withhold records without identifying with reasonable specificity the individuals who would be harmed by release. As the court of appeals noted, there is no support in the legislative history for the notion that Congress intended to radically expand Exemption 7(F) to serve as "an all-purpose damper on global controversy." Pet. App. 36a.

In fact, the legislative history makes clear that Congress intended the 1986 amendments to have

only a limited effect on the scope of Exemption 7(F). *See, e.g.*, 131 Cong. Rec. S248 (daily ed. Jan. 3, 1985) (statement of Carol E. Dinkins, Deputy Attorney General) (the 1986 amendments modify Exemption 7(F) only "slightly"); 132 Cong. Rec. H9,462 (daily ed. Oct. 8, 1986) (statement of Rep. English) (the 1986 amendments make "only modest changes to the FOIA" and only "slight[ly] expan[d]" Exemption 7(F)). As the court of appeals noted, there is no evidence that Congress intended the 1986 amendments to "transform[]" Exemption 7(F) into "a diffuse and nebulous authority for keeping inflammatory information secret (though, curiously, only inflammatory information in law enforcement files)." Pet. App. 35a. There is certainly no evidence that Congress intended to create an alternative mechanism for withholding records on national security grounds without compliance with the substantive and procedural safeguards set out in Exemption 1 and the Executive Order referenced therein. The court of appeals properly held that the government's "attempt to sweep far-reaching and speculative national security concerns into exemption 7(F) reaches far beyond the intent of Congress in enacting or amending the provision." *Id.* at 36a.

As the court of appeals noted, the case law overwhelmingly supports this understanding of Exemption 7(F)'s plain language, statutory context, and legislative history. *Id.* at 37a, 42a. No circuit court has adopted a construction remotely as broad as the one the government proposes here. The government relies on an anomalous, unreported

district court case from 1984 that read the exemption broadly, Pet. 21 (citing *Larouche v. Webster*, No. 75 Civ. 6010, 1984 WL 1061 (S.D.N.Y. Oct. 23, 1984)), but virtually all of the pre-1986 cases addressed Exemption 7(F) in contexts in which the government asserted that disclosure of records would endanger specific officers, *see, e.g.*, *Republic of New Afrika v. Fed. Bureau of Investigation*, 656 F. Supp. 7, 12 n.15 (D.D.C. 1986) (Exemption 7(F) applies "where the information relates to 'possible future targets for retaliation.'" (quoting 2 O'Reilly, *Federal Information Disclosure* § 17.12 (1984)); *Moody v. Drug Enforcement Admin.*, 592 F. Supp. 556, 558 (D.D.C. 1984) ("Exemption (b)(7)(F) is designed to protect the identities of law enforcement sources.").[9]

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[9] *See also Schanen v. U.S. Dep't of Justice*, 773 F.2d 1065, 1066 (9th Cir. 1985) (ordering the government to produce for *in camera* inspection, in the context of Exemption 7(F), "the name(s) of the person or persons that appellant alleges would be physically endangered by disclosure, the precise facts that, if disclosed would create such a danger, the precise manner in which such danger would arise if disclosure is ordered, and the name(s) of the person or persons who allegedly pose such a danger"); *Scherer v. Kelley*, 584 F.2d 170, 176 (7th Cir. 1978) (upholding, under Exemption 7(F), the withholding of details of the involvement of law enforcement agents in the criminal investigation of the FOIA requester); *Maroscia v. Levi*, 569 F.2d 1000, 1002 (7th Cir. 1977) (same for "the identities of FBI and other law enforcement personnel"); *Moody*, 592 F. Supp. at 558 (same for the identities of "DEA supervisory agents and other special DEA agents, as well as local law enforcement officers"); *Ferri v. U.S. Dep't of Justice*, 573 F. Supp. 852, 864 (W.D. Pa. 1983) (same for the "names of the government agents contained in the DEA investigative reports"); *Docal v. Bennsinger*, 543 F. Supp. 38, 48 (M.D. Pa. 1981) (same for "the names and identities of DEA Special Agents, Supervisory Special Agents,

Cases post-dating the 1986 amendments appropriately take a broader view of Exemption 7(F) because they address danger to individuals other than law enforcement personnel, but they, too, almost uniformly address contexts in which the government has identified with reasonable specificity the individuals who could be endangered by the release of requested records. Indeed, almost all of these cases involve contexts in which the files *themselves* identified, at least inferentially, the individuals who could be endangered by disclosure. *See* Pet. App. 42a ("[V]irtually every court having occasion to interpret exemption 7(F) has been called upon to determine whether the disclosure of law enforcement records could reasonably be expected to endanger the life or physical safety of any individuals who participated in some way in the investigation, be they law enforcement employees, informants, or witnesses, or others associated in some way with those persons."); *id.* at 37a & n.12

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and local law enforcement officers"); *Malizia v. U.S. Dep't of Justice*, 519 F. Supp. 338, 351 (S.D.N.Y. 1981) (same for "the identities of DEA special agents"); *Nunez v. Drug Enforcement Admin.*, 497 F. Supp. 209, 212 (S.D.N.Y. 1980) (same for "the names of DEA personnel involved in the investigations in question"); *Ray v. Turner*, 468 F. Supp. 730, 737 (D.D.C. 1979) (same for "the name of a Customs Service agent"); *Shaver v. Bell*, 433 F. Supp. 438, 441 (N.D. Ga. 1977) (same for the "names and information that might lead to the identity of such law enforcement personnel"); *see also Fiumara v. Higgins*, 572 F. Supp. 1093, 1107 (D.N.H. 1983) ("Deletion of names and information that might lead to the identity of such law enforcement personnel may be appropriate.").

(citing cases).[10] Accordingly, the Second Circuit properly construed the 1986 amendments.[11]

In sum, the court of appeals correctly determined that Exemption 7(F)'s text, its statutory context, its legislative history, and the relevant case law do not support the government's construction of that provision. Consequently, the government has failed to present any basis for disturbing the court of appeals' well-reasoned decision.[12]

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[10] *See, e.g.*, *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 552 (6th Cir. 2001) (agency properly withheld "information about DEA agents"); *Antonelli v. Fed. Bureau of Prisons*, 623 F. Supp. 2d 55, 58 (D.D.C. 2009) ("In general, [Exemption 7(F)] has been interpreted to apply to names and identifying information of law enforcement officers, witnesses, confidential informants and other third persons who may be unknown to the requester. In reviewing claims under exemption 7(F), courts have inquired whether there is some nexus between disclosure and possible harm and whether the deletions were narrowly made to avert the possibility of such harm." (citations omitted)).

[11] The government cites three post-1986 district court cases in arguing for a "broader reach" for Exemption 7(F). Pet. 31. In none of those cases, however, did the court permit the withholding of records on the grounds that disclosure would be inflammatory and provoke violence by unspecified individuals against other unspecified individuals. *See also* Pet. App. 37a-41a.

[12] The government now contends that the Second Circuit's holding is "problematic" because that court did not remand to provide the government an opportunity to satisfy the specificity requirement of Exemption 7(F). Pet. 31 n.11. but the government had ample notice that its alternative construction of Exemption 7(F) was contrary to prevailing case law. Moreover, in proceedings before the district court, the government's counsel was specifically asked by the court if the military police depicted in the Abu Ghraib photographs were

## II. GRANTING THE PETITION WOULD FURTHER DELAY THE DISCLOSURE OF RECORDS THAT ARE OF EXTRAORDINARY IMPORTANCE TO AN ONGOING NATIONAL DEBATE.

As this Court has recognized, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Robbins Tire & Rubber Co.*, 437 U.S. at 242; *see also* Pet. App. 51a. The photographs at issue here are precisely the kinds of records that the statute was meant to address. They depict governmental misconduct of the gravest sort, "plac[ing] governmental accountability at the center of the dispute." Pet. App. 41a. The public interest in their disclosure is "significant," *id.* at 51a; *see also id.* ("The defendants concede that these photographs yield evidence of governmental wrongdoing . . . ."); Pet. 16 (acknowledging that "certain photographs at issue depict reprehensible conduct by American personnel"), particularly now as the nation debates whether to further investigate these and other similar abuses.

The government suggests that the disclosure of investigative files—which describe the images at

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"particularly in danger." C.A. App. 331. The court noted that there was "no indication in the record that suggested that was the case." *Id.* at 332. The government's counsel responded that "the sense of danger is broad . . . in terms of parsing out who might be in more danger than others, I don't know that we can fairly do that." *Id.*

issue here, Pet. 6 & n.5—satisfies its obligation under FOIA, *id.* at 15. FOIA does not permit the government to withhold records, however, simply because it believes that the public has enough information already. In any event, it is plain that textual descriptions of photographs are not a substitute for the photographs themselves. As the district court explained, "photographs present a different level of detail and a different medium, and are . . . better than testimony, which can be self-serving, better than summaries, which can be misleading, and better even than a full description no matter how complete that description might be." Pet. App. 122a; *see also Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 98 (6th Cir. 1996) (noting that photographs of government misconduct can "serve to subject the government to public oversight" and "reveal . . . circumstances . . . in a way that written information cannot"). It is not surprising, therefore, that photographs have historically played an important role in drawing attention to abuses and advancing the cause of human rights throughout the world. Brief for Human Rights Watch et al. as Amici Curiae Supporting Respondents (Sept. 8, 2009) (No. 09-160). Here too, as the Second Circuit noted, release of the photographs may "deter[] the future abuse of prisoners." Pet. App. 58a.

In essence, the government contends that it should be entitled to withhold the best evidence of its own misconduct because that evidence may be inflammatory. FOIA, however, proceeds on the very different premise that an informed electorate is critical to democratic decision-making and the best

antidote to governmental abuse. As Justice Brandeis observed many years ago: "Sunlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, Other People's Money 62 (1933)). This Court should not further delay the disclosure of information that relates to governmental misconduct, that is crucial to an ongoing national debate, and that both the district court and the Second Circuit correctly concluded has been withheld unlawfully.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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